

Samuel Berington, on the Demise of John Dormer, Plaintiff
Esq; - - - - - Sin Error.

K and others 79 8/6 m. 5.
John Parkhurst Esq, Catherine Dormer Spinster, John
Cox, Judith Brasfall, John Brasfall, Richard Collins,
Henry Shippen, Richard Morgan, Sir John Fortescue
Aland Knight, Richard White, Elizabeth Hadland, } Defendants
Thomas Butcher, Joseph Hadland, Richard Edgerley, } in Error.
Thomas Sare, William Cotfell, Joseph Stapp, Richard
Franklyn, Thomas Stanley, and Elizabeth Butcher, }

The CASE of the Defendants in Error.

Michaelmas
Term 5 Geo. II.
1731.

THE said John Dormer brought his Ejectment in the Court of King's Bench, for the Manor of Sibdon, and divers Messuages, Lands and Tenements, Five Shillings Rent, and View of Frankpledge, in Sibdon, and divers other Places in the County of Bucks; and also for all Tythes in Shepedon Lee, upon a Lease made by the said John Dormer to the Plaintiff his Lessee, upon the 1st of October, in the Fifth Year of his Majesty's Reign, for 20 Years, from the 29th of September then last past.

Hilary Term 5
Geo. II. 1731.

The Defendants appeared, and entered into the common Rule to confess Lease Entry and Ouster, (which all Defendants in Ejectment are obliged to do) and pleaded not guilty; upon which Issue was joined.

31 Oct. Michael.
Term 9 Geo. II.
1735.

The Cause was tried at the Bar of the Court of King's Bench, and a general Verdict was found for the Defendants, as to the Tythes, Rent and View of Frankpledge mentioned in the Declaration; so that the Defendants are indisputably intitled to Judgment upon that Part of the Verdict.

And as to the said Manor, and the Residue of the Premises in question, the Jury found a special Verdict, to the Effect following, viz.

13 Aug. 1662.

That John Dormer, and Sir John Dormer his Son and Heir apparent, being seized in Fee, by an Indenture of Feoffment of that Date made between them of the first Part; Susanna Brawne of the second Part; Sir Robert Jenkinson and Sir William Child of the third Part; and John Cave and Thomas Marriott of the fourth Part; and by common Recovery thereby agreed to be suffered, in Consideration of a Marriage intended to be had between the said Sir John Dormer and Susanna Brawne, and of Five thousand Pounds paid and secured to be paid to the said John Dormer by Susanna, as her Marriage Portion, and other Considerations therein mentioned, Did settle, assure and convey the said Manor, and the Residue of the Premises in question, to the following Uses, viz.

To the Use of the said John Dormer and his Heirs, till the said Marriage between Sir John and Susanna Brawne: And from and after the Marriage,

As to Part of the Premises,

To the Use of the said Sir John Dormer and his Assigns, for 99 Years, if he should so long live; and from and after the Death of the said Sir John Dormer, or other sooner Determination of the Estate therein limited to him, for 99 Years as aforesaid,

To the Use of Trustees and their Heirs, during the natural Life of the said Sir John Dormer, upon Trust, to support the contingent Uses therein after limited.

Remainder, as to Part of the said Premises limited to the said Sir John Dormer;

To the Use of the said Susanna for her Life, for her Jointure.

And as for and concerning all the Residue of the Premises, whereof no Use was limited to Sir John or Susanna,

To the Use of the said John Dormer for his natural Life, without Impeachment of Waste; Remainder

To the Use of the said Sir John Dormer for 99 Years, if he should so long live, without Impeachment of Waste;

Remainder, As to the Premises before limited to the said Sir John, Susanna, and the said John Dormer,

To the Use of Trustees, upon Trust, to support the contingent Uses therein after limited;

Remainder to the Use of the first and other Sons of the Body of the said Sir John Dormer by the said Susanna, severally and successively, in Tail Male; and for want of such Heirs Male,

Remainder, As to several Lands therein particularly specified,

To Trustees for 99 Years, without Impeachment of Waste, upon Trust, for raising Portions and Maintenances for the Daughters of Sir John, in case of no Issue Male: And as to those Lands, after the End or sooner Determination of that Term, and also as to all the Residue of the Premises, after the End and Determination of the several Estates therein before limited;

To the Use of the first and other Sons of the said Sir John Dormer by any other Wife than the said Susanna, severally and successively in Tail Male; Remainder

To the said John Dormer for his Life; and, after his Decease,

These are the
very Words of the
Settlement.

"To the Use and Behoof of Robert Dormer, (late one of the Justices of the Court of Common Pleas) second Son of the said John Dormer, and his Assigns, for and during the Term of 99 Years, if the said Robert Dormer shall so long happen to live; and from and after the Death of the said Robert Dormer, or other sooner Determination of the Estate herein limited to the said Robert Dormer for 99 Years as aforesaid; then to and for the Use and Behoof of Trustees, and their Heirs, for and during the natural Life of the said Robert Dormer, upon Trust and Confidence, to support and preserve the contingent Remainders, Uses and Estates herein after limited from being defeated or destroyed, and to that Purpose to make Entries, as Occasion shall require; nevertheless to permit the said Robert Dormer, and his Assigns, to take the Rents, Issues and Profits thereof during the Term of his natural Life; and after the End or other sooner Determination of the said Term,"

To the Use of the first and other Sons of the said Robert Dormer, severally and successively, in Tail Male; Remainder

To Fleetwood Dormer, younger Son of the said John Dormer, and to Trustees, to support contingent Uses; and to his first and other Sons, in the same Manner as the same is limited in the Case of the said Robert Dormer; Remainder

To all and every other Son and Sons of the said John Dormer, severally and successively, in Tail Male; Remainder

To

To the said *John Dormer*, and the Heirs Male of his Body ; Remainder

To *Peter Dormer*, Brother of the said *John Dormer*, and his Assigns, for 99 Years, if he should so long live ; Remainder

To Trustees, to support contingent Uses ; Remainders

To his first and other Sons in Tail Male ; with the like Remainder

To *Fleetwood Dormer*, another Brother of the said *John Dormer*, and his Assigns, for 99 Years, if he should so long live, and to Trustees to support contingent Uses, and to his first and other Sons in Tail Male ; Remainder

To *Bennett Dormer*, Son and Heir of *Euseby Dormer*, deceased, who was Brother of the said *John Dormer*, and his Assigns, for 99 Years, if he should so long live ; Remainder to Trustees to support contingent Uses ; Remainder

To the first and other Sons of *Bennett Dormer* ; Remainder

To *Euseby Dormer*, Brother of the said *Bennett*, and Nephew of the said *John Dormer*, for 99 Years, if he should so long live ; Remainder to Trustees to support contingent Uses ; Remainder to the first and other Sons of the said *Euseby*, severally and successively, in Tail Male ; Remainders

To the Heirs of the Body of the said *John Dormer* ; Remainder

To the said *John Dormer*, his Heirs and Assigns, for ever.

The Jury find the Marriage between Sir *John Dormer* and *Susanna* ; and that a Recovery was suffered, pursuant to the said Indenture.

The Jury further find the Entries of the said Sir *John Dormer* and *John Dormer* into the Lands respectively limited to them ; and that the said Manor and Residue of the Premises in Question, are Parcel of the Lands first limited to the said Sir *John Dormer* for 99 Years, and also Parcel of the Lands first limited to the said *John Dormer* for his Life.

They find the Deaths of *Susanna* and Sir *John Dormer* ; and that Sir *John* had Issue Male of his Body by *Susanna*, Sir *William Dormer*, Baronet, his only Son and Heir at Law, living at his Death ; and that Sir *William* attained his Age of Twenty-one Years, and entered into the Premises first before limited to Sir *John*.

That the said *John Dormer* died, leaving the said Sir *William*, his Grandson, his Heir Male of his Body, and that, after his Death, Sir *William* entered into the Premises limited to the said *John Dormer*, and thereby became seized of the said Manor, and Residue of the Premises in Question, as of Fee Tail, to himself, and the Heirs of his Body.

That the said *John Dormer* had Issue three Sons, viz. the said Sir *John Dormer* his eldest Son, the said *Robert Dormer* his second Son, and the said *Fleetwood Dormer* his youngest Son, and no other Issue Male : That *Fleetwood* the youngest died in the Life-time of Sir *William*, without any Issue Male. And they also find the Deaths of the said *Peter*, *Fleetwood* and *Bennett Dormer*, who are named in the said Settlement, without any Issue Male.

They find, that, upon the 9th of March 1725, Sir *William Dormer* died, seized of such his Estate as aforesaid, without leaving any Issue Male ; and that the said *Robert Dormer*, second Son of the said *John Dormer*, after the Death of the said Sir *William Dormer*, to wit, upon the said 9th of March 1725, entered into the said Manor, and Residue of the said Premises in Question, and was possessed thereof for the Term of 99 Years, if he should so long live, by the said Indenture, limited to the Use of the said *Robert Dormer* as aforesaid, the further Remainders thereof belonging as aforesaid.

They find, that the said *Robert Dormer* had Issue Male of his Body, *Fleetwood Dormer* his only Son ; and that he had no other Issue Male of his Body : —

That the said *Robert Dormer* being so possessed, afterwards, and after the Death of the said Sir *William Dormer*, in Easter Term, in the 12th Year of the Reign of King George the First, 1726, the said *Robert Dormer*, and *Fleetwood* his Son, levied a Fine with Proclamations, and suffered a Recovery (amongst other Things) of the said Manor, and Residue of the Premises in Question.

They find, that afterwards, in the Life-time of the said *Robert Dormer*, to wit, the 22d of June 1726, the said *Fleetwood*, the Son of the said *Robert Dormer*, died without Issue ; and that the said *Robert* survived him ; and afterwards, to wit, on the 16th of September 1726, the said *Robert Dormer* died, without any Issue Male of his Body then living ; but leaving four Daughters and Heirs, viz. *Mary Dormer*, Dame *Elizabeth*, the Wife of the said Defendant Sir *John Fortescue Aland*, *Ricarda*, the Wife of the Defendant *Parkhurst*, and the Defendant *Catherine Dormer*.

That after the Death of the said *Robert Dormer*, and before the Time of levying the Fine hereafter mentioned, the said Sir *John Fortescue Aland*, and *Elizabeth* his Wife, *John Parkhurst*, and *Ricarda* his Wife, and *Catherine Dormer*, entered into the said Manor, and Residue of the said Premises in Question, and received the Profits thereof, and were seized thereof as the Law requires ; and they being so seized thereof, did, in Easter Term in the 3d Year of the present King 1730, levy a Fine, with Proclamations (amongst other Things) of the said Manor, and Residue of the said Premises in Question.

That, on the 3d of September 1729, the said *Euseby Dormer*, the Nephew of the said *John Dormer*, died, leaving Issue Male of his Body the said *John Dormer*, the Lessor of the Plaintiff, his eldest Son, and Heir Male of his Body ; and that, before the Death of the last-mentioned *Euseby*, the said Term of 99 Years, limited to Trustees for raising Portions and Maintenances for the Daughters of Sir *John Dormer*, was, in due Form of Law, surrendered and extinguished.

That, after the Death of the last-named *Euseby Dormer*, to wit, on the 10th of September 1731, the said *John Dormer*, the Lessor of the Plaintiff, entered into the said Manor, and Residue of the Premises in Question, with Intent to make the said Demise, in the Declaration mentioned, to the Plaintiff, in order to enable the Plaintiff to bring this Action of Ejectment ; but did not then make an actual Entry into the said Manor, and the said Residue of the said Premises in Question, for the Purpose of avoiding the said Fines, or either of them ; and thereupon the said *John Dormer*, the Lessor of the Plaintiff, became and was seized thereof, as the Law requires ; and being so seized thereof, he, on the 1st of October, in the Fifth Year of the Reign of the present King, made the Lease mentioned in the Declaration ; and that, by virtue thereof, the Plaintiff entered into the said Manor, and the said Residue of the Premises in Question, and was possessed thereof until the Defendants entered and ejected him.

They further find, that the said *John Dormer* the Lessor of the Plaintiff, on the 6th of January 1731, actually and in Fact entered into the said Manor, and Residue of the said Premises in Question, claiming Title thereto, and then and there claimed the same as his Estate and Freehold ; and that, on the 6th of October 1732, he actually and in Fact again entered into the said Manor, and Residue of the said Premises in Question, claiming Title thereto, and then and there claimed the same as his Estate and Freehold ; and that, on the 5th of October 1733, he actually and in Fact again entered into the said Manor, and Residue of the Premises in Question, claiming Title thereto, and then and there claimed the same as his Estate and Freehold.

But whether, upon the whole Matter, in Form aforesaid found, the Defendants are guilty of the Trespass and Ejectment in the said Manor, and Residue of the said Premises in Question, as the Plaintiff complains against them, the Jury were ignorant ; and thereupon prayed the Advice of the Court ; and if, upon the whole Matter, it should seem to the Court, that the Defendants were guilty, then the Jurors found them guilty, and assessed Damages, besides Costs, to 1 s. and for Costs 40 s. and if it should seem to the Court that the Defendants were not guilty, then the Jury found them not guilty.

The Occasion of finding this special Verdict, was, that, upon the Trial, Two Points were insisted upon for the Defendants.

1st. That

Points insisted on
for the Defen-
dants on the Trial.

1st. That the Remainder limited by the Settlement, under which the Lessor of the Plaintiff claimed, was barred by the aforesaid Fine levied by the said *Robert Dormer*, and *Fleetwood* his Son, and the Recovery suffered by *Fleetwood* the Son in 1726.

2^{dly}. That altho' the Plaintiff should not be barred by the said Fine and Recovery, yet by that Fine, and the Fine of the Daughters of *Robert Dormer* in 1730, all Persons who were out of Possession are barred, until an actual Entry be made, or at least so dispossessed that they cannot bring an Ejectment; and in this Case the actual Entry found, is subsequent in Time to the Demise in the Declaration, and void; in regard, that, by Law, no Person can make a good Lease, who is out of Possession.

Hil. Term 1736.

The special Verdict was argued by Council on both Sides in the Court of *King's Bench*; and a further Argument was ordered.

Hil. Term 1737.

It was again argued by Council on both Sides, and tho' both the before-mentioned Points were spoke to by the Council, yet, in regard the Defendants were intitled to Judgment, if the Court were of Opinion in favour of them upon either Point; and the Court being unanimously of Opinion, that an actual Entry was necessary to be made by the Lessor of the Plaintiff, before the First Day of *October* 1731, being the Time of making the Demise laid in the Declaration, and no such Entry having been made, therefore the Court gave Judgment for the Defendants upon that Point, without determining the other Point.

Upon this Judgment the Plaintiff has brought a Writ of Error returnable in Parliament.

Plaintiff's Objec-
tions to the Point
of the Judgment.

And with regard to the Point whereon Judgment was given, it is apprehended, the Council for the Plaintiff in Error will insist upon the following Objections, viz.

1st. That there is no Occasion for an actual Entry, because the Defendants, upon the Trial, confessed Lease, Entry and Ouster.

2^{dly}. That if an actual Entry be necessary, yet it is not necessary to be made before the Day of the Demise laid in the Declaration; but if it be made before bringing the Ejectment, it is sufficient.

3^{dly}. That altho' the Demise is laid in the Declaration to have been made the 1st of *October* 1731, and no actual Entry was made before that Day, yet as several Entries were found by the Verdict to have been made afterwards, those Entries will have Relation to the Time of the Commencement of the Lessor of the Plaintiff's Title, and gain him a Possession from that Time, and consequently the Demise to the Plaintiff was well made.

4^{thly}. That by the Statute 4th of *Henry VII.* c. 24. an Action will save the Bar, as well as an Entry; and that the Ejectment is sufficient for that Purpose.

Answer to those
Objections.

It was determined by all the Judges of *England* in *Hilary* Term in the 2^d Year of *Queen Anne*, that an actual Entry is necessary to avoid a Fine, before an Ejectment can be brought, and the constant Practice has been so ever since; and it is apprehended that it must be before the Time of the Demise, because a Fine is of that high Nature, even at common Law, that it dispossesses all Persons claiming Title, and consequently a Lease to found the Ejectment upon, cannot be made till the Lessor regains the Possession. And as to the Entries found by the Verdict to have been made subsequent to the Time of the Demise, it is apprehended they can be of no Use in the present Case; because the Ejectment Lease being originally void, could not be made good by a subsequent Act; and therefore, whatever Effect those Entries might have in other Respects, they could not make the Lease good; and the Word ACTION in the Statute of the 4th of *Henry VII.* has been always explained to mean real Actions, which were then in Use; and it has been often determined, that the bringing an Ejectment is not sufficient to avoid a Fine.

Plaintiff's Objec-
tion with respect
to the Merits.

That the said *Robert Dormer* being only Tenant for Years, and the Freehold being limited to the Trustees for his Life, to support the contingent Uses; with Remainder to his first and other Sons in Tail Male, the Fine levied by *Robert* and *Fleetwood*, the next Remainder Man in Tail, was void, or at least no Freehold passed thereby; and consequently the Recovery suffered by *Fleetwood* the Son of *Robert*, was also void, for want of good Tenants to the Precipe, it being necessary they should be Tenants of the Freehold.

Answer.

This Objection depends upon a Supposition, that there was then an Estate of Freehold in the Trustees, and is conceived to be a very unfavourable Objection, in regard that the Remainder Man in Tail, for whose Benefit they were made Trustees, joined in the Fine and Recovery.

But further, — It is apprehended, that the Freehold was then in *Fleetwood Dormer* the Son of *Robert Dormer*, and not in the Trustees. The Words of the Settlement are, *And from and after the Death of the said Robert Dormer, or other sooner Determination of the Estate limited to him for 99 Years as aforesaid, then to the Use and Bechoof of the Trustees, and their Heirs, for and during the natural Life of the said Robert Dormer.* Now, taking all the Words together, it is apprehended they are so absurd, that they cannot be of any Effect; but taking them distributively, in the first Place, the Limitation is *from and after the Death of Robert, to the Trustees, for the Life of Robert*, which is impossible. And, in the next Place, suppose the Words, *from and after the Death of Robert*, were to be rejected, then it would rest upon the Words, *or other sooner Determination of the Estate limited to him for 99 Years.* And then, as it was quite uncertain whether that Term of 99 Years would determine before the Death of *Robert*, the Limitation to the Trustees could, at the most, be but a contingent one; and if so, then as *Fleetwood* the next Remainder Man was in Being at the Death of *Sir William Dormer*, His became a vested Remainder, and he had thereby an Estate of Freehold to enable him to make good Tenants to the Precipe.

And there is no Reason to construe the Limitation favourably; for tho' the ancient Method was to limit an Estate for Years to the Father, determinable on his Death, and then to the Trustees for the Life of the Father, to support the contingent Uses, then to the first and other Sons of the Father in Tail, yet that Method tended so much to Perpetuities, which are odious in the Law, and was found so inconvenient, that the constant Method now is, to limit an Estate for Life to the Father; and had the Limitation been so in this Case, there could have been no Doubt but the Recovery had been well suffered. Besides, it is apprehended, that the Limitation in the present Case cannot, by any Rule of Construction whatsoever, be extended beyond the express Words of it; and then the Recovery is well suffered, and the Right of the Lessor of the Plaintiff barred.

And in the present Case, the Daughters of the said *Robert Dormer*, in favour of whom the Judgment is given, are the Grand-daughters of the said *John Dormer* who made the Settlement, and the Heirs of *Robert*, and *Fleetwood* the Tenant in Tail; whereas the Lessor of the Plaintiff is only a collateral Relation, and the most remote Remainder Man in the Deed.

The Defendants in Error therefore humbly hope, That the said Judgment given in the Court of King's Bench will be Affirmed in this Honourable House, with Costs.

D. RYDER.
J. STRANGE.

[illegible]

That there is no objection for an actual Entry, because the D. of the said, upon the Trial, confessed that, Entry and Order.

It was determined by all the Judges of the Court in the Year of Our Lord, that in a civil
 case, a writ should be granted to a party, who had been wronged, and who could not
 obtain redress by the ordinary course of law, to compel the party who had wronged him,
 to make satisfaction to him, and to pay him the damages which he had sustained.
 This writ was called a writ of *habeas corpus*, and it was granted to the party who
 had been wronged, to compel the party who had wronged him, to make satisfaction
 to him, and to pay him the damages which he had sustained. This writ was
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the first, it is necessary that they should be the friends of the people.

Wife of John Dormer Esq;
John Parkhurst Esq; and
others, — — — }
The CASE of the Defendants
To be Heard at the Bar of the
of LORDS, on Monday
Day of May, 1738.

in Error.
Defendants
in Error.
in Error.

the House
the 15th

J. STRANGE
D. RYDER